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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-860

F. DAVID MATHEWS, Secretary of Health, Education, and Welfare,
Appellant

vs.

JOHN A. JOBST,
Appellee

On Appeal from the United States District Court for the Western District of Missouri, Western Division

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MOTION FOR LEAVE TO FILE APPELLEE'S MOTION TO DISMISS OR AFFIRM IN FORMA PAUPERIS

Appellee John A. Jobst by his attorney, Jerome D. Riffel, respectfully moves this Honorable Court to grant him leave to file his Motion to Dismiss or Affirm in forma pauperis and in support thereof states as follows:

1. Judge John W. Oliver, United States District Judge for the Western District of Missouri, declared unconstitutional "42 U.S.C. §402(d)(1)(D) and §402(d)(5) as applied to child's insurance beneficiaries who marry totally disabled persons who do not receive child's insurance benefits." Judge Oliver remanded the claim of appellee John A. Jobst with the express instruction that appellant reinstate the child's insurance benefits.

2. Thereafter the appellant Casper W. Weinberger, Secretary of Health, Education and Welfare, filed his Notice of Appeal to the United States Supreme Court.

3. In Weinberger v. Jobst, 419 U.S. 811, 42 L.Ed.2d 38, 95 S.Ct. 26 (1974), this Court directed the District Court to reconsider its decision in light of 42 U.S.C. §1381 et seq. (Supplemental Security Income).

4. The District Court thereafter found and concluded "that the judgment originally entered should be and will be reinstated;" after which the Secretary sought a second review of the District Court opinion.

5. Appellee believes that the issues raised in his Motion to Dismiss or Affirm are meritorious and of sufficient importance for the consideration of this Court. In support thereof he attaches his Affidavit in support of motion to proceed in forma pauperis, which is hereby incorporated herein by reference.

WHEREFORE, appellee John A. Jobst prays that leave be given to file his motion to dismiss or affirm the appeal of appellant Casper W. Weinberger and that he not be required to pay fees, costs or give security thereunder.

Respectfully submitted,

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Attorney for Appellee

CERTIFICATE OF SERVICE

Pursuant to Rule 33 of the Rules of this Court, counsel for appellee caused copies of the foregoing motion to be mailed with air mail postage prepaid to Robert H. Bork, the Solicitor General, Department of Justice, Washington, D.C. 20530, on this 25 day of January, 1977.

Attorney for Appellee

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-860

F. DAVID MATHEWS, Secretary of Health,
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Appellant

vs.

JOHN A. JOBST,
Appellee

On Appeal from the United States District Court for the Western District of Missouri, Western Division

MOTION TO DISMISS OR AFFIRM

Appellee John A. Jobst moves the Court to dismiss the appeal herein on the grounds hereinafter set forth, or to affirm the judgment sought to be reviewed, on the ground that it is manifest that the questions raised by appellant on which the decision in this cause would depend are so unsubstantial as not to need further argument.

SUGGESTIONS

The Question Presented by Appellant for Review of This Court is So Unsubstantial As To Make Further Consideration of the Issues Herein Unnecessary.

1. The Secretary seeks a second review of the decision of Judge John W. Oliver, in which the Court declared unconstitutional "42 U.S.C. §402(d)(1)(D) and §402(d)(5) as applied to child's insurance beneficiaries who marry totally disabled persons who do not receive child's insurance benefits," Jobst v. Richardson, 368 F.Supp. 909, 914 (W.D.Mo. 1974).

In Weinberger v. Jobst, 419 U.S. 811, 42 L.Ed.2d 38, 95

S.Ct. 26 (1974), this Court issued a Memorandum Order directing the United States District Court, Western District of Missouri, to reconsider its decision declaring unconstitutional the sections of the Social Security Act "as applied to child's insurance beneficiaries who marry totally disabled persons who do not receive child's insurance benefits . . .; in light of 42 U.S.C. (Supp. II, 1972) 1381 et seq. (86 Stat. 1389; Pub. L. No. 92-603 (October 30, 1972)." After due consideration of evidence adduced by the parties and the effect of 42 U.S.C. §§1381, et seq. (SSI benefits) on plaintiff Jobst's claim for child disability benefits, the District Court found and concluded "that the judgment originally entered should be and will be reinstated (slip opinion at 1)."

Appellee Jobst now moves the Court for its Order affirming the Memorandum and Order of the United States District Court, Western District of Missouri. His motion "should be granted if the questions on which the decision depends are so wanting in substance as not to need further argument." Hodges v. Snyder 261 U.S. 600, at 601 (1923); see also Missouri Pacific Railroad Co. v. Castle, 224 U.S. 541, 544 (1912); Chicago Rock Island & Pacific Railroad Co. v. Devine, 239 U.S. 52, 54 (1915).

2. The facts and circumstances concerning appellant's termination of Jobst's child's insurance benefits under §202(d) of the Social Security Act are not in dispute. Section 202(d) of the Social Security Act, 42 U.S.C. §402(d), provides child's benefits to disabled-dependent children of insured wage earners, who are receiving old age or disability benefits, or who have died fully insured under the Act. Disabled persons like Jobst receiving these benefits lose them only in the event of death of the recipient or their marriage. Upon marriage to "another individual who has attained the age of eighteen and is entitled to benefits under this subsection [therefore disabled child

beneficiary]," the recipient's benefits continue unaffected. §202(d)(5) of the Social Security Act, 42 U.S.C. §402(d)(5)(B).

Appellant concedes the total disability of appellee's spouse and the only reason cited by the Secretary for termination of Jobst's insurance was his wife's non-receipt of child's insurance benefits. Jobst's wife (like Jobst) suffers from cerebral palsey but was ineligible (non-insured parent) for child's insurance benefits under the Social Security Act.

3. The suggestion of the Secretary to the contrary notwithstanding, the question presented to the Court for review is clearly insubstantial. As will be shown infra, the decision affects only a relatively small number of child's insurance beneficiaries who marry a totally disabled person not receiving child's insurance benefits. The sections alleged to be affected by the Secretary[1] pertain to divorced wives, widows, widowers, and surviving or divorced mothers under different circumstances and where different legislative and administrative considerations predominate.

The District Court properly applied the test established by this Court in Jimenez v. Weinberger, 417 U.S. 628 (1974), governing the propriety (under the Due Process Clause of the Fifth Amendment) of congressional classifications established by Congress in the Social Security Act. The facts and circumstances herein are truly analygous to those in Jimenez, Id., and do not involve "a principle that has general application under the Social Security Act . . .," as alleged by defendant-appellant Secretary.

4. The Secretary demonstrated the unsubstantiality of the question raised by his failure to justify the invidious

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[1]See Sections 202(b)(1)(C), 202(e)(1)(A), 202(f)(1)(A), and 202(g)(1)(A), of the Social Security Act: 42 U.S.C. §§402(b)(1)(C), (402(e)(1)(A), 402(f)(1)(A), and 402(g)(1)(A).

discrimination resulting from the statutory classifications established as between two classes of recipients who are married disabled persons which are indistinguishable except on the basis that one class marries disabled persons who are eligible for benefits under the Act and the other marries totally disabled persons who are ineligible.

In this connection the District Court appropriately considered whether there was a rational legislative basis for the distinctions resulting in light of the purposes of the Social Security Act:

> No actual basis for such a distinction has been suggested nor, we conclude, does one exist. The distinction between the two classes of beneficiaries has absolutely no relevance to the purpose for which the general classifications in the statute were drawn. Indeed, the statutory distinctions are antithetical to that purpose; they result in a situation similar to the one here, in which benefits are denied to a beneficiary who marries a person who cannot provide a source of support to the beneficiary. Indeed it is clear that insurance payments were extended to children by §202(d) "to provide at least some measure of income and security to those who have lost a wage-earner on whom they depended." (Citations omitted.) Jobst v. Richardson, 368 F.Supp. 909, 913 (W.D.Mo. 1974).

Likewise in Jimenez, discriminatory statutory classification of subclasses of illegitimate children was examined to determine whether a rational basis was demonstrated by the Secretary relating to the statutory purpose of provision for "disabled child's benefits to the dependent disabled child of a deceased or retired insured worker."[2] This Court rejected the reasoning of the Secretary for reasons similar to those stated above by the District Court:

> Even if children might rationally be classified on the basis of whether they are dependent upon their disabled parent, the Act's definition of these two subclasses of illegitimates is "over-inclusive" in that it benefits some children who are legitimated, or entitled to inherit, or illegitimate solely because of a defect in the marriage of their parents, but who are not dependent upon their disabled parent. Conversely, the Act is "under-inclusive" in that it conclusively excludes some illegitimates in appellants' subclass who are, in fact, dependent upon their disabled parent. Thus, for all that is shown in this record, the two subclasses of illegitimates stand on equal footing , and the potential for spurious claims is the same as to both; hence to conclusively deny one subclass benefits presumptively available to the other denies the former the equal protection of the law guaranteed by the Due Process provision of the Fifth Amendment. Supra, 42 Law Week at 4950, 4951.

The Secretary misapplies the above test asserting that inasmuch as the congressional purpose in providing an exception to termination of benefits for those recipients who marry disabled persons also receiving child's insurance benefits is consistent with the purposes of the Social Security Act, the section is rationally based and does not offend the Due Process Clause of the Fifth Amendment. This observation, however, is at best superfluous since it ignores the rationality of the discriminatory classifications of beneficiaries themselves.

The "legislation must be drawn so that the distinctions made have 'some relevance to the purpose for which the classification is made.'" Jobst v. Richardson, supra, at 913; quoting Baxstrom v. Herold, 383 U.S. 107, 111 (1966). Furthermore, the Secretary neglects to discuss whether the classifications created by §202(d) of the Social Security Act are free from invidious discrimination:", Dandridge [referring to Dandridge v. Williams, 397 U.S. 471 (1970)] evinced no intention to suspend the operation of the Equal Protection Clause in the field of social welfare law. State laws and regulations must still 'be rationally based and free from invidious discrimination.'" Hagans v. Lavine, 415 U.S. 528, 539 (1974).

5. The Secretary then incorrectly suggests the applicability of the maxim, "that a classification may not properly be held to violate equal protection principles because it is

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[2] 1956 U.S. Code Cong. & Adm. News, at 3878.

not made with mathematical nicety or because in practice it results in some inequality," and that this Court's approval of the District Court opinion "would require Congress to abandon use of broad, experimentally based assumptions in the Social Security Act in favor of an individualized means test."[3]

Appellant does not deny the assertion of the Secretary that Congress may terminate the benefits of recipients when they separate from the family unit and may allocate benefits on the relative likelihood of dependency, but does assert the clear inapplicability of these generally acceptable principles to the situation here.

That inapplicability is illustrated by appellant's mistaken reliance on a recent decision of this Court, Mathews v. DeCastro, 45 Law Week 4049 (December 13, 1976). In the DeCastro case a difference in the statutory treatment of married and divorced women was held to be permissible under the Fifth Amendment to the United States Constitution. This Court reversed the District Court which had voided the statutory provision denying benefits on the basis that "there is no rational basis for concluding that a married wife having a dependent child in her care has a greater economic need than a divorced wife caring for such child." Citing Helvering v. Davis, 301 U.S. 619, 640.

The District Court was reversed because the test as applied to the discriminatory classification examined only the "needs" of the beneficiary instead of whether the classification established was consistent with the purpose of the Social Security Act to protect the insured worker and his dependents. Close examination of the classifications created moreover demonstrated there was a "reasonable basis" for the classifications since the divorce of the recipient clearly showed less likelihood of dependence on the deceased insured-worker and hence any discrimination was

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[3]See appellant's Jurisdictional Statement at p. 9.

rationally based in terms of the legislative purpose of the Social Security Act.

It does not follow that termination of Jobst's benefits is similarly related to the legislative history of the Social Security Act. As pointed out by this Court, the Secretary must look to whether the classifications here have some rational basis: "Government does not deny equal protection merely because of classifications made by its laws are imperfect. If the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality,'" Mathews v. DeCastro, supra, at 4050, citing Dandridge v. Williams, 397 U.S. 471, 485.

The Secretary thus correctly parrots the proper caveat that the classification need not be made with mathematical nicety but ignores in toto the remaining requirement that it have some "reasonable basis." Again, "Dandridge evinced no intention to suspend the operation of the Equal Protection Clause in the field of social welfare law. State laws and regulations must still be 'rationally based and free from invidious discrimination.'" Id., 397 U.S. at 487. Termination of benefits as a result of John Jobst's marriage to Sandra Jobst does not relate in any manner whatever to the likelihood of continuing dependency on the lost wage earner as impliedly conceded by the Secretary. The failure of the Secretary to suggest such a rational basis is a fatal omission and this appeal therefore raises no substantial question.

6. The Secretary finally suggests that legislative and administrative considerations dictate the reversal of the District Court. Appellant again does not question the conclusions of the Secretary that Congress may properly establish presumptions or other tests which serve administrative convenience

of processing applications for benefits, that benefits may be allocated on likelihood of dependency, and that a proper test for gauging the continuing eligiblity of beneficiaries for child's insurance benefits is whether the terminating event removes their dependency on the deceased wage earner. Simply stated, none of these conclusions appropriately considered affect the decision of the District Court.

In this respect the Secretary relies principally upon F. W. Mathews v. Lucas, ___ U.S. ___, 49 L.Ed.2d 651 (1976). In Mathews, the Supreme Court considered whether an alleged discriminatory classification established by the Social Security Act which had the effect of assuring presumptive eligibility of dependent legitimate children of deceased insured workers while illegitimate children of deceased insured workers were required to establish their dependency on the deceased person's income, violated the Due Process Clause of the Fifth Amendment to the United States Constitution.

In reviewing the District Court decision this Court perused the character of the discrimination and its relationships to legitimate legislative aims. Id. at 661-663. The Court then sustained the constitutionality of the section concerned on the bases that there was no blanket exclusion of surviving illegitimate children and hence no invidious discrimination under Jimenez, supra, and that Congress's purpose in establishing the statutory presumption of dependency of legitimate children properly served administrative convenience. "Such presumptions in aid of administrative functions, though they may approximate, rather than precisely mirror, the results that case-by-case adjudication would show are permissible under the Fifth Amendment, so long as the lack of precise equivalence does not exceed the bounds of substantiality tolerated by the applicable level of scrutiny. Id. at 663; citing Weinberger v. Salfi, 422 U.S. at 772 (Emphasis

added).

Therefore, the Court sustained the limited use of such presumptions as an aid to efficient administration of benefits by the Social Security Administration. Its appropriateness is to be judged on the basis of "the materiality of the relation between the statutory classifications and the likelihood of dependency they assertedly reflect [which] need not be "scientifically substantiated." Id. at 663.

The Secretary, however, fails to point out that these considerations are inapplicable to the circumstances in fact presented here. These classes are indistinguishable except on the basis that one class marries disabled persons who are eligible for benefits under the Act and the other marries disabled persons who are ineligible. On the solitary basis of this differential the latter class loses its entitlement to lifetime child's benefits in total disregard of the recipient's continuing dependency on the deceased wage earner. The Secretary offers no justification for this discrimination and it is therefore prohibited under Jimenez v. Weinberger, supra. "[T]o conclusively deny one subclass benefits presumptively available to the other denies the former the equal protection of the laws guaranteed by the Due Process provision of the Fifth Amendment." Id. at 637. In Mathews v. Lucas, relied upon by the Secretary, however, such administrative considerations were proper since "any other eligible child may qualify for survivorship benefits by showing contribution to support, or cohabitation, at the time of death."

Other considerations also demonstrate the lack of substance of the Secretary's argument. Sandra A. Jobst is a totally disabled recipient of Supplemental Security Income (which is administered by the Secretary) under Title XVI. Sandra Jobst previously received federally aided welfare benefits from the State of Missouri which were substantially regulated by defendant

Secretary. Defendant Secretary has agreed at all times relevant to this action that Sandra Jobst was totally and completely disabled and the Secretary can therefore not be taken seriously in his suggestion that benefits for John A. Jobst would cause administrative havoc for the Social Security Administration.

Congress in fact at the time of the enactment of child's insurance benefits stated that "[d]etermination of disability generally would not be difficult because of the few cases involved. Most of the cases would be the result of congenital conditions or conditions existing since early childhood, including mental deficiency."[4] The Secretary states moreover that the difference in benefits for the "family unit" is small therefore assuring little impact initially on the distribution of "finite resources."

The District Court therefore properly concluded that administrative convenience does not justify the patently overt discrimination as to this subclass which happens to (1) marry, (2) a person who is also totally disabled, (3) who does not receive child's insurance benefits, under circumstances where the secretary has available applicable disability standards and where the marriage is clearly unrelated to the continuing dependency of the insurance recipient.[5]

7. Title XVI does not underscore the reasonableness of the allocation of Social Security benefits herein to disabled children of insured workers, and Title XVI is legislatively unrelated to the work-based Social Security program.

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[4]1956 U.S. Code Cong. & Adm. News at 3878.

[5]The irrationality of the termination of Jobst under the purposes of the Social Security Act is further demonstrated by his impending divorce from his wife Sandra. He will soon (February 13, 1977) dissolve his marriage, but nevertheless must depend on welfare benefits even though at no time has there been any change whatever concerning his continuing dependency on the insured wage earner. See affidavit in support of motion to proceed herein in forma pauperis.

The Secretary alleges that the $20.00 differential in monthly welfare benefits now received by the new Jobst family as compared to the greater amount of their monthly income had Jobst continued receiving child's insurance benefits, substantiates appellant's argument that the discrimination resulting is reasonable. This argument is based on his contention that SSI was formed "to afford more adequate protection to the family as a unit."[6]

Problematically, the resulting differential in benefits for John A. Jobst, the dependent of an insured worker, is even more substantial and the Secretary would owe Jobst in excess of $8,000 in back benefits in the event the District Court's decision stands.[7] Even more importantly, the dependence of Jobst on the earnings of the deceased wage earner continues without regard to the event of his marriage to Sandra A. Jobst.

"The primary objective of the Social Security Act was to provide workers and their families with basic protection against hardship created by the loss of earnings due to illness or old age. Mathews v. DeCastro, supra, at 4050. The primary difference between Social Security and Supplemental Security Income not recognized by the Secretary was pointed out by this Court in the opinion in the DeCastro case: "Again, the insurance program, unlike the public assistance provisions [referring to child's disability benefits and supplemental security income] was not need based and instead was designed to protect against the specific economic hardships created by involuntary, premature retirement." Id. at 4050, footnote 6, referring to H.R.Rep.No. 1300, 800 1st Cong., 1st Sess. CSS. 24-28, 53-54

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[6]See appellant's Jurisdictional Statement at p. 7.

[7]The Secretary contends this amount should be reduced by some $3,000; thus conceding that even if Jobst was forced to reimburse the Secretary for his SSI benefits, the Secretary would have a remaining obligation of approximately $5,000.

(1949).

As was stated in Mathews v. DeCastro, "the focus of the Social Security Act was specifically on 'adequate protection for [the husband's] family.'" Id. at 4051. Congress could therefore rationally decide that in denying divorced women Social Security benefits under the circumstances there that "the problems created for divorced women remain less pressing than those faced by women who continue to live with their husbands." Id. at 4051. It does not follow that the classification created here either serves administrative convenience or is consistent with the purposes of the legislation. In fact, the Secretary, impliedly admits by his failure to suggest a justification, that the classification of John A. Jobst as a nonrecipient on the basis of his marriage to a totally disabled person is invidiously discriminatory and unrelated to the work-based social security program. This fact remains unchanged upon consideration of his subsequent receipt of welfare benefits.

8. For these reasons appellee suggests the Secretary's appeal herein should be dismissed or in the alternative the decision of the District Court affirmed.

Respectfully submitted,

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